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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

CLARENCE EDWARD HILL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CAPITAL CASE
EXECUTION SCHEDULED FOR
JANUARY 24, 2006, 6:00 P.M.

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

D. TODD DOSS
Florida Bar No. 0910384
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025-6092
Telephone (386) 755-9119

COUNSEL FOR PETITIONER

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?

2. Whether, under this Court's decision in Nelson, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?

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JANUARY 24, 2006, 6:00 P.M.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, **CLARENCE EDWARD HILL**, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review Order of the Eleventh Circuit Court of Appeals.

CITATION TO OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals in this cause appears as Hill v. Crosby, Case No. 06-10621 (11th Cir. January 24, 2006), and is attached to this petition as Appendix A. The decision of the United States District Court, Northern District of Florida, Tallahassee Division appears as Hill v. State, Case No. 4:06-cv-032-SPM, and is attached to this petition as Appendix B.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. Section 1257. The Eleventh Circuit Court of Appeals issued an opinion denying relief on January 24, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. amend. VIII.
>
> No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983

PROCEDURAL HISTORY

On November 2, 1982, Mr. Hill was indicted and charged with one count of first degree murder, one count of attempted first degree murder, three counts of armed robbery, and possession of a firearm during the commission of a felony. (R. 1440-41). Following a trial which commenced on April 27, 1983, the jury found Mr. Hill guilty of all the crimes charged. (R. 1662). Subsequently, the jury rendered an advisory sentence recommending death by a vote of ten to two, which the trial court imposed. (R. 1665, 1668-9).

Mr. Hill appealed his conviction to the Florida Supreme Court, which found that the trial court erred in denying Mr. Hill's challenge of a juror who was not impartial in his state of mind. The Court remanded the case for a new penalty phase with a new jury. Hill v. State, 477 So. 2d 553 (Fla. 1985).

Mr. Hill's new penalty phase was held on March 24, 1986. By a vote of eleven to one, the jury issued an advisory opinion for Mr. Hill's death on March 27, 1986. The circuit court sentenced Mr. Hill to death on April 2, 1986. (RS. 835).

Mr. Hill filed an appeal with the Florida Supreme Court, which affirmed his sentences. Hill v. State, 515 So.2d 176 (Fla. 1987). Mr. Hill then filed a Petition for a Writ of Certiorari before this Court, which was denied. Hill v. State, 108 S.Ct. 1302 (1988).

On November 9, 1989, the Governor of Florida signed a death warrant scheduling Mr. Hill's execution for January 25, 1990. Mr. Hill's counsel filed an expedited Motion to Vacate Judgments of Convictions and Sentences with Special Emergency Request for Leave to Amend on December 11, 1989. (PCR. 1-128). On January 18, 1990, the circuit court refused to grant Mr. Hill an evidentiary hearing and summarily denied Mr. Hill's motion.

On January 22, 1990, Mr. Hill appealed the order from the circuit court. (PCR. 387). Mr. Hill also filed a habeas corpus petition with the Florida Supreme Court. On January 26, 1990, the Florida Supreme Court denied all relief. Hill v. State, 556 So. 2d 1385 (Fla. 1990).[1]

Mr. Hill subsequently filed a Motion to Stay Execution and a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Florida on January 27, 1990. The district court granted a stay on January 28, 1990. On August 31, 1992, the district court granted relief to Mr. Hill on the grounds that the circuit court and the Florida Supreme Court failed to conduct a proper harmless error test when re-weighing the aggravating factors after eliminating the cold, calculating, and premeditating aggravator. Furthermore, the trial judge failed to find certain nonstatutory mitigating facts even though

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[1] Mr. Hill's execution was rescheduled for Monday, January 29, 1990 at 7:01 a.m.

mitigation was established by the record. The district court made no recommendation as to whether a new sentencing hearing had to be conducted.

Upon remand, Mr. Hill filed a motion to reopen his direct appeal to address the issues cited by the United States District Court. The Florida Supreme Court granted the motion, but upon re-weighing the four remaining aggravating factors against the one statutory mitigating circumstance of Mr. Hill's age and several non-statutory mitigating factors that were not previously considered, the court resentenced Mr. Hill to death. Hill v. State, 643 So. 2d 1071 (Fla. 1995).

Mr. Hill then filed an amended habeas corpus petition before the United States District Court challenging the decision of the Florida Supreme Court. The district court denied relief on the grounds that the Florida Supreme Court satisfied the dictates of Parker v. Dugger, 498 U.S. 308 (1991). Mr. Hill appealed this decision to the Eleventh Circuit Court of Appeals, which found that the district court had correctly decided Mr. Hill's claims. Hill v. Moore, 175 F.3d 915 (11th Cir. 1999). Mr. Hill subsequently filed a Petition for Writ of Certiorari before this Court, which was denied. See Hill v. State, 528 U.S. 1087 (2000).

Mr. Hill filed a successive Rule 3.850 motion in state court on June 20, 2003 pursuant to Ring v. Arizona, 536 U.S. 584

(2002). The circuit court denied said motion on May 26, 2004, and denied the motion for rehearing on June 21, 2004. Mr. Hill timely filed his appeal to the Florida Supreme Court, which was denied on May 13, 2005.

On November 29, 2005, Governor Jeb Bush signed a death warrant setting an execution date of January 24, 2006 at 6:00 p.m. Mr. Hill filed a successive 3.850 motion on December 15, 2005. Following a case management conference on December 19, 2005, the lower court orally denied Mr. Hill an evidentiary hearing on his claims for relief. A written order was issued on December 23, 2005.

On December 31, 2005, Mr. Hill filed a notice of appeal of the order from the circuit court. (PCR. 387). On January 17, 2006, the Florida Supreme Court denied all relief. Hill v. State, 2006 Fla. LEXIS 8 (January 17, 2006). On January 20, 2005, Mr. Hill filed a Petition for a Writ of Certiorari before this Court.

On Friday, January 20, 2006, Mr. Hill brought an action pursuant to 42 U.S.C. § 1983 in the United States District Court, Northern District of Florida, Tallahassee Division. Mr. Hill alleged violations of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. On Saturday, January 21, 2006, the district court dismissed Mr. Hill's complaint for declaratory and injunctive relief for lack of jurisdiction.

On Monday, January 23, 2006, Mr. Hill filed a Notice of Appeal. On that same date, Mr. Hill filed in the Eleventh Circuit an Application for a Stay of Execution and for Expedited Appeal. The Eleventh Circuit denied Mr. Hill's Application on January 24, 2006.

FACTS RELEVANT TO QUESTIONS PRESENTED

In his complaint brought pursuant to 42 U.S.C. § 1983 in the United States District Court, Mr. Hill asserted that the defendants, acting under color of Florida law, are using a succession of three chemicals that will cause unnecessary pain in the execution of a sentence of death, which they have admitted to be their practice, which is unnecessary as a means of employing lethal injection, and which creates a foreseeable risk of inflicting unnecessary and wanton infliction of pain contrary to contemporary standards of decency.

Mr. Hill's claim was premised upon a recent study published in the world-renowned medical journal THE LANCET by Dr. David A. Lubarsky (whose declaration was attached to Mr. Hill's Complaint) and three co-authors who detailed the results of their research on the effects of chemicals in lethal injections. See Koniaris L.G., Zimmers T.A., Lubarski D.A., Sheldon J.P., Inadequate anaesthesia in lethal injection for execution, Vol 365, THE LANCET 1412-14 (April 16, 2005). This study confirmed, through the analysis of empirical after-the-fact data, that the

scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.[1] The authors found that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium pentothal in their bloodstream to provide anesthesia. (Complaint, Att. B). In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride.

As explained in the declaration of Dr. Lubarsky, sodium pentothal is an ultra-short acting substance which produces shallow anesthesia. (Complaint, Att. A). Health-care professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and use different drugs to bring the to patient to a "surgical plane" of anesthesia that will last through the operation and will block the stimuli of surgery which would otherwise cause pain. Sodium

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[1] Dr. Lubarski has noted that each of the opinions set forth in the Lancet study reflects his opinion to a reasonable degree of scientific certainty. (Complaint, Att. A).

pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia; the patient is supposed to be able to wake up and signal the staff that something is wrong.

The second chemical used in lethal injections in Florida is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which stops the breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. (Complaint, Att. A). Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. (Complaint, Att. A).

The third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart. It also causes massive muscle cramping before causing cardiac arrest. (Complaint, Att. A). When the potassium chloride reaches the heart, it causes a heart attack. If the anesthesia has worn off by that time, the condemned feels the pain of a heart attack. However, in this case, Mr. Hill will be unable to communicate his pain because the pancuronium bromide has paralyzed his face, his

arms, and his entire body so that he cannot express himself either verbally or otherwise. (Complaint, Att. A).

As explained by Dr. Lubarsky, because Florida's practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicology reports, which kept records of them, and which disclosed them to the LANCET scholars, there is at least the same risk (43%) as in those jurisdictions that Mr. Hill will not be anesthetized at the time of his death. (Complaint, Att. A).

THE FEDERAL COURTS' RULINGS

In dismissing Mr. Hill's complaint for lack of jurisdiction, the district court stated:

> Because Plaintiff's motion raises no true issues of newly-discovered evidence, it is the functional equivalent of a successive petition for writ of habeas corpus. Robinson, 358 F.3d at 1284. As such, he should have first sought the permission of the Eleventh Circuit under 28 U.S.C. § 2244 to file such a successive petition. There is no indication in the record whatsoever that Plaintiff has followed this procedure. Absent authorization from the Eleventh Circuit, this Court lacks jurisdiction to entertain the instant successive petition.

Hill v. State, Case No. 4:06-cv-032-SPM, at 5.

In upholding the district court's order, the Eleventh Circuit Court of Appeals stated:

> It is clear to us that the district court lacked jurisdiction to consider appellant's claim because it is the functional equivalent of a successive habeas petition and he failed to obtain leave of this court to file it. See 28 U.S.C. § 2244(b)(3)(A). And as the panel observed in Robinson, "such an application to

> file a successive petition would be due to be denied in any event. *See In re Provanzano*, 215 F.3d 1233, 1235-36 (11th Cir. 2000), *cert. denied*, 530 U.S. 1256, 120 S.Ct. 2710, 147 L.Ed.2d 979 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B))."

Hill v. Crosby, Case No. 06-10621 at 3:

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD REVIEW THE ISSUES SURROUNDING THE ELEVENTH CIRCUIT'S DETERMINATION THAT MR. HILL'S CHALLENGE TO A PARTICULAR PROTOCOL WHICH THE STATE PLANS TO USE DURING THE EXECUTION PROCESS CONSTITUTES A SUCCESSIVE HABEAS CORPUS PETITION.

A. Uncertainty amongst the circuits

In Nelson v. Campbell, 541 U.S. 637 (2004), this Court addressed the parameters of an action under 42 U.S.C. § 1983, as a vehicle for challenging a procedure relating to an inmate's execution:

> We have not yet had occasion to consider whether civil rights suits seeking to enjoin the use of a particular method of execution — *e.g.*, lethal injection or electrocution — fall within the core of federal habeas corpus or, rather, whether they are properly viewed as challenges to the conditions of a condemned inmate's death sentence. Neither the "conditions" nor the "fact or duration" label is particularly apt. A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the "fact" or "validity" of the sentence itself — by simply altering its method of execution, the State can go forward with the sentence. Cf. *Weaver* v. *Graham*, 450 U.S. 24, 32-33, n. 17 (1981) (no *ex post facto* violation to change method of execution to more humane method). On the other hand, imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of

> execution, see Ala. Code § 15-18-82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion. See *Calderon* v. *Thompson*, 523 U.S. 538, 556-557 (1998); *In re Blodgett*, 502 U.S. 236, 238 (1992) *(per curiam)*; *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them").

Nelson, 541 U.S. at 643-4.

This Court concluded that it "need not reach here the difficult question of how to categorize method-of-execution claims generally." Id. at 644. Rather, in the specific case of a cut-down procedure, the Court stated:

> Respondents at oral argument conceded that § 1983 would be an appropriate vehicle for an inmate who is not facing execution to bring a "deliberate indifference" challenge to the constitutionality of the cut-down procedure if used to gain venous access for purposes of providing medical treatment. Tr. of Oral Arg. 40 ("I don't disagree . . . that a cut-down occurring for purposes of venous access, wholly divorced from an execution, is indeed a valid conditions of confinement claim"); see also *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment" (citation omitted)). We see no reason on the face of the complaint to treat petitioner's claim differently solely because he has been condemned to die.

Id. at 644-5.

Subsequent to Nelson, there has been dissension amongst the various federal circuits in determining to what extent, if any, a challenge to an execution procedure constitutes a colorable claim under 42 U.S.C. § 1983.

1. *Methods of execution can be challenged*

The Ninth Circuit Court of Appeals has determined that a § 1983 action is in fact a proper vehicle by which to challenge a method of execution. Beardslee v. Woodford, 395 F.3d 1064, 1068 (9th Cir. 2005).

2. *A particular protocol can be challenged*

The Fourth Circuit Court of Appeals, on the other hand, has permitted a § 1983 action where the Petitioner does not assert that lethal injection generally is an unconstitutional method of execution, but rather that the particular protocol the State plans to use is impermissible. Reid v. Johnson, 2004 U.S. App. LEXIS 15855, *6 (2004), stay vacated by Johnson v. Reid, 2004 U.S. LEXIS 4856 (2004)("In light of *Nelson*, we conclude that Reid has stated a cognizable claim under *§ 1983*. Like Nelson, Reid does not assert that lethal injection generally is an unconstitutional method of execution. Rather, he asserts only that the particular protocol the State plans to use is

impermissible; he acknowledges that other protocols would pass constitutional muster.").[1]

3. *Leaving the issue open*

However, the Fifth Circuit Court of Appeals has declined to directly address the issue, instead disposing of such claims on other grounds. See, e.g., Harris v. Johnson, 376 F.3d 414, 417 (5th Cir. 2004)("We do not decide whether Harris properly states a claim under *§ 1983*, because even if he does, he is not entitled to the equitable relief he seeks."). See also Aldrich v. Johnson, 388 F.3d 159, 161 (5th Cir. 2004)("Because Aldrich did not allege or show that there is any alternative to the protocol that the State proposes to use in his execution, the district court properly dismissed his *§ 1983* action.").

4. *Any challenge amounts to a successive habeas petition*

Finally, the Eleventh Circuit Court of Appeals has determined that:

> And as the panel observed in Robinson, "such an application to file a successive petition would be due to be denied in any event. *See In re Provanzano*, 215

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[1]A United States District Court for the Second Circuit Court of Appeals has applied a similar logic. See Ross v. Rell, 392 F. Supp 2d 224, 226 (D.Ct. Conn. 2005)(note omitted)("The plaintiff here has not challenged the constitutionality of lethal injection in all cases, but only the specific protocol of drugs and attendant procedures used by the State of Connecticut as will be applied to Michael Ross. Therefore, the action properly may be construed as a *section 1983* claim and not a petition for habeas corpus relief.").

F.3d 1233, 1235-36 (11th Cir. 2000), cert. denied, 530 U.S. 1256, 120 S.Ct. 2710, 147 L.Ed.2d 979 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B))."

Hill v. Crosby, Case No. 06-10621 at 3.

B. This Court should resolve the split in the circuits

Mr. Hill respectfully submits that this Court should grant certiorari in order to resolve the dissension amongst the circuits as to this issue.

C. Mr. Hill's complaint does not challenge a method of execution generally

In any event, Mr. Hill maintains that his complaint brought pursuant to 42 U.S.C. § 1983 does not fall into the category of "method-of-execution claims generally." Nelson, 541 U.S. at 644. As in Nelson, Mr. Hill is not challenging the statutory provision which allows for lethal injection as a method of execution.[1] ("[A] constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself." Id. at 693-4). Rather, Mr. Hill is "seeking to enjoin a particular means of effectuating a sentence of death [which] does not directly call into question the 'fact' or 'validity' of the sentence itself — by simply altering its method of execution, the State can go forward with the sentence." Id. at 693-4. Here, it is the succession of chemicals to be

[1]In fact, the protocol utilized by the Department of Corrections is not part of any state statutory provision.

utilized, in accordance with the Department of Correction's protocol, which creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.

The Eighth Amendment prohibits the substantial risk of punishments that "involve the unnecessary and wanton infliction of pain," Gregg v. Georgia, 428 U.S. 153, 173 (1976); Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459 (1947). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" Rhodes v. Chapman, 452 U.S. 337, 346 (1981). The Eighth Amendment reaches "exercises of crue lty by laws other than those which inflict bodily pain or mutilation." Weems v. United States, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to "circumstance[s] of degradation," Id. at 366, or to "circumstances of terror, pain, or disgrace" "superadded" to a sentence of death. Id. at 370 (emphasis added).

Mr. Hill submits that his complaint is a cognizable one under 42 U.S.C. § 1983, as explained by this Court in Nelson, and that the federal courts erroneously recharacterized it as a succesive habeas corpus petition.

CONCLUSION

Petitioner, Clarence Edward Hill, requests that certiorari review be granted.

Respectfully submitted,

/S/ D. Todd Doss
D. TODD DOSS
Florida Bar No. 0910384
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025-6092
Telephone (386) 755-9119
Facsimile (386) 755-3181

COUNSEL FOR PETITIONER

Copies furnished to:

Carolyn Snurkowski
Assistant Attorney General
Office of the Attorney General
Plaza Level 1
The Capitol
Tallahassee, FL 32399

APPENDIX A

(PUBLISH)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
January 24, 2006
THOMAS K. KAHN
CLERK

No. 06-10621

CLARENCE E. HILL,

Plaintiff-Appellant,

versus

JAMES V. CROSBY, JR.,
CHARLIE CRIST,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Florida

(January 24, 2006)

Before EDMONDSON, Chief Judge, TJOFLAT and PRYOR, Circuit Judges.

BY THE COURT:

Appellant Clarence Edward Hill has been convicted of capital murder in Florida and sentenced to death. His execution is scheduled for today, January 24, 2006, at 6:00 p.m. On January 20, 2006, he applied to this court for leave to file a

second and successive habeas petition in an effort to forestall his execution. We denied his application in an order entered earlier today. At the same time, we denied his application under 28 U.S.C. §§ 1651 and 2251 for a stay of his execution.

Also on January 20, 2006, appellant brought this suit for declaratory and injunctive relief under 42 U.S.C. § 1983, in the United States District Court for the Northern District of Florida. He contends that death by lethal injection causes pain and unnecessary suffering and thus constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments. He seeks a permanent injunction barring his execution. On January 21, 2006, the district court issued an order dismissing appellant's complaint on the ground that the complaint "is the 'functional equivalent' of a successive habeas petition," and that the court lacked jurisdiction to entertain it in the absence of an order from the court of appeals granting appellant leave to file a successive petition.

The district court relied on as authority for its ruling our decision in Robinson v. Crosby, 358 F.3d 1281 (11th Cir. 2004), which, as the district court properly observed, dealt with "the very issue" appellant's complaint presents here. Appellant now appeals the district court's order, and he asks that we stay his execution pending our disposition of his appeal.

It is clear to us that the district court lacked jurisdiction to consider appellant's claim because it is the functional equivalent of a successive habeas petition and he failed to obtain leave of this court to file it. See 28 U.S.C. § 2244(b)(3)(A). And as the panel observed in Robinson, "such an application to file a successive petition would be due to be denied in any event. *See In re Provanzano*, 215 F.3d 1233, 1235-36 (11th Cir. 2000), *cert. denied*, 530 U.S. 1256, 120 S.Ct. 2710, 147 L.Ed.2d 979 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B))."

For this reason, we DENY appellant's application for a stay of his execution pending appeal.

SO ORDERED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CLARENCE HILL.

Plaintiff,

v.

*****CAPITAL*****
Case No.: 4:06-cv-032-SPM

JAMES CROSBY, Secretary of the Florida Department of Corrections, in his official capacity; and CHARLES CRIST, JR., Attorney General, in his official capacity,

Defendants.
_____/

ORDER DISMISSING COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

THIS CAUSE comes before the Court upon the "Verified Complaint for Declaratory & Injunctive Relief" (doc. 2) and all accompanying attachments and appendices filed by Plaintiff through counsel on January 20, 2006, and the response from the Attorney General (doc. 6) also filed January 21, 2006. For the following reasons, the Court finds that the motion must be dismissed for lack of jurisdiction.

This case has a long history dating back to Plaintiff's original death sentence in May of 1983. The procedural history is set out in the Florida

Supreme Court's opinion of January 17, 2006, Hill v. State, 2006 WL 91302 (Fla. Jan. 17, 2006), demonstrating that Plaintiff has filed previous petitions for habeas corpus, both in the federal and state courts. *See, e.g.*, Hill v. Dugger, 556 So. 2d 1385 (Fla. 1990); Hill v. Moore, 175 F.3d 915 (11th Cir. 1999); Hill v. Butterworth, 941 F. Supp. 1129 (N.D. Fla. 1996).

Plaintiff now brings the instant suit as a motion for declaratory and injunctive relief under 42 U.S.C. § 1983 for alleged prospective violations of his right to be free from cruel and unusual punishment (doc. 2-1 at 2), claiming that death by lethal injection causes pain and unnecessary suffering. In support of his claim, Plaintiff points to "newly-discovered evidence" in the form of an article from the medical journal The Lancet, which purportedly found that inmates (in the cases studied by the researchers) had felt pain during their executions due to insufficient amounts of anesthetic in their bloodstream. Plaintiff seeks a permanent injunction barring the execution of his death sentence.

This very issue was dealt with by the Eleventh Circuit in Robinson v. Crosby, 358 F.3d 1281 (11th Cir. 2004). In Robinson, the appellant filed a § 1983 action in the Middle District of Florida alleging that "lethal injection causes those who are executed pain and suffering while they are paralyzed and unable to communicate." Id. at 1282. The district court dismissed the petition for lack of jurisdiction, holding that the appellant's § 1983 action was the functional equivalent of a successive habeas corpus petition, which would subject him to the authorization requirements of 28 U.S.C. § 2244. Absent the permission of

the Eleventh Circuit, the appellant was not authorized to file a successive petition, and thus the district court lacked jurisdiction to consider it. Id. at 1283-84.

The Eleventh Circuit explicitly upheld the district court's finding:

> We conclude that the district court correctly dismissed Robinson's § 1983 complaint for lack of jurisdiction. A § 1983 claim seeking relief--including a TRO, preliminary injunction, or a stay of execution--from a sentence of death as cruel and unusual punishment is the "functional equivalent" of a successive habeas petition. The district court lacked jurisdiction to consider Robinson's claim because he failed to apply to this Court for permission to file a successive habeas petition. We further note that such an application to file a successive habeas petition would be due to be denied in any event. *See In re* Provenzano, 215 F.3d 1233, 1235-36 (11th Cir.2000), *cert. denied*, 530 U.S. 1256 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B)).

Id. at 1284 (remaining internal citations omitted). Plaintiff's claim, like that of the appellant in Robinson, is virtually identical to those raised in other cases in which stays of execution have been denied. Id. at 1283 (*citing In re* Roe, 540 U.S. 1171 (2004); Vickers v. Johnson, 540 U.S. 1170 (2004); Zimmerman v. Johnson, 540 U.S. 1087 (2003); *and* Beck v. Rowsey, 540 U.S. 1098 (2004) (Supreme Court vacated stay entered by district court)).

Plaintiff's claim of "newly-discovered evidence" is insufficient to overcome the procedural bar in this case. Plaintiff cites the Lancet article as conclusive proof that inmates do feel pain during the lethal injection procedure. He details the injection process, noting that sodium pentothal is first administered as an anesthetic, followed by pancuronium bromide, a paralytic agent which prevents

the inmate from moving or otherwise showing pain or discomfort. The final chemical to be injected is potassium chloride, which causes the actual death by stopping all movement of the heart and suffocating the inmate. The Lancet researchers found that toxicology reports in their case studies demonstrated that insufficient amounts of anesthetic were injected, permitting the inmates to experience the feelings of being suffocated and having a heart attack, yet remaining paralyzed by the pancuronium. While Florida's procedure was not examined in the study, Plaintiff argues that Florida's practice is "substantially similar" and thus poses the same risk to inmates.

These exact issues were raised and disposed of in Robinson, in which the Eleventh Circuit referred to affidavits filed in that case addressing "the effects of the drugs used during lethal injection, how they each cause pain and suffering, and particularly how the pancuronium bromide chemical paralyzes the person and masks the pain and suffering being incurred." Id. at 1285 n.4. An additional affidavit "discusse[d] how the level of potassium chloride being used in the lethal injection context may not cause actual cardiac arrest but may result in death by suffocation due to lack of oxygen." Id.

While the Lancet article itself may be new, having just been published last year, the factual basis of Plaintiff's claim has certainly been raised and disposed of in numerous cases, both in Florida and in other states. Plaintiff has made no showing that he could not have discovered these underlying predicates through the exercise of due diligence. *See in re* Provenzano, 215 F.3d 1233, 1236-37

(11th Cir 2000)

Because Plaintiff's motion raises no true issues of newly-discovered evidence, it is the functional equivalent of a successive petition for writ of habeas corpus. Robinson, 358 F 3d at 1284 As such, he should have first sought the permission of the Eleventh Circuit under 28 U S C § 2244 to file such a successive petition. There is no indication in the record whatsoever that Plaintiff has followed this procedure. Absent authorization from the Eleventh Circuit, this Court lacks jurisdiction to entertain the instant successive petition

Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff's complaint/motion for declaratory and injunctive relief (doc. 2) is hereby *dismissed* for lack of jurisdiction. No stay of execution shall issue in this case

DONE AND ORDERED this twenty-first day of January, 2006

/s/ Stephan P. Mickle

Stephan P. Mickle
United States District Judge

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The Supreme Court of Florida also noted in its opinion that

> [a]cross the nation, courts have rejected claims that The Lancet study requires a new evaluation of the constitutionality of lethal injection. See Brown v. Crawford, 408 F 3d 1027 (8th Cir 2005) (dismissing an appellant's motion for a stay of execution despite the fact that the appellant based his claim under 42 U.S C § 1983 in part on The Lancet study at issue here); Baeghler v. State, 839 N E 2d 691 (Ind 2005) (finding The Lancet study was not sufficient to establish "a reasonable probability that Indiana's method of execution violates the federal or state constitution")

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